

# **EXHIBIT “S-3”**

COUNTY COURT OF THE STATE OF NEW YORK  
COUNTY OF ONONDAGA

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

CALENDAR

HECTOR RIVAS,

Defendant.

Indictment No.: 92-1114-1  
NYSID No.: 1375082H  
505 South State Street  
Syracuse, New York 13202  
January 5, 2016

B E F O R E:

HONORABLE THOMAS J. MILLER, Justice.

A P P E A R A N C E S:

WILLIAM J. FITZPATRICK, ESQ.  
District Attorney  
505 South State Street  
Syracuse, New York 13202  
BY: ROBERT MORAN, ESQ.  
Assistant District Attorney

EDWARD KLEIN, ESQ.  
SIDNEY MANES, ESQ.  
Attorneys for the Defendant

Adam H. Alweis, RPR  
Senior Court Reporter

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## Proceedings

1 THE CLERK: Hector Rivas.

2 (The defendant was present for the  
3 following.)

4 THE COURT: You can be seated, sir. You can  
5 be seated.

6 Okay. This is the matter of the People of  
7 the State of New York v. Hector Rivas.

8 Ed Klein as well as Sidney Manes appear along  
9 with Hector Rivas. ADA Rob Moran appears on behalf of  
10 the People.

11 Thank you all for appearing today on short  
12 notice.

13 Let's do some housekeeping. Let me see if I  
14 can put this into some perspective.

15 I recently received the December 23rd, 2015  
16 order of the Second Circuit Court of Appeals with  
17 regard to this matter and I've added this case to the  
18 calendar this morning in order to address the Second  
19 Circuit's concerns.

20 The Second Circuit's order stated that unless  
21 a retrial has commenced on or before February 1st,  
22 2016, the State of New York would have to show cause  
23 why the defendant should not be released from custody  
24 pending a retrial.

25 The Second Circuit has further indicated its  
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1 expectation that Mr. Richard Langone would be ready to  
2 proceed as trial counsel by that date.

3 I would like to briefly note the unusual  
4 procedural history of this case.

5 On March 11th, 2015, the Second Circuit  
6 issued a decision directing the Federal District Court  
7 to issue a Writ of Habeas Corpus to the defendant  
8 within 60 days unless the State had taken concrete and  
9 substantial steps expeditiously to retry the defendant.

10 On March 25th, 2015, Mr. Rivas initially  
11 appeared before this Court with his appellate attorney,  
12 Richard Langone, as well as Mr. Manes, who has been  
13 assisting the defendant pro bono.

14 Senior ADA Rob Moran also appeared on behalf  
15 of the People.

16 I did not set a trial date at that time only  
17 because Mr. Langone had indicated that he was unsure if  
18 he would be representing the defendant at trial.  
19 Nevertheless, Mr. Langone indicated that he would be  
20 filing a motion to vacate the defendant's judgment of  
21 conviction pursuant to Criminal Procedure Law 440.10.  
22 I set a motion return date of April 20th, 2015 and  
23 Mr. Langone subsequently filed a motion to vacate the  
24 judgment of conviction.

25 On April 20th, 2015, I granted the  
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1 defendant's motion to vacate his judgment of conviction  
2 based upon a determination that the defendant had been  
3 deprived of the effective assistance of counsel at his  
4 original trial in 1993.

5 The People also re-announced their readiness  
6 for trial on the indictment because Mr. Langone  
7 indicated that he would like to remain involved in this  
8 case through motion practice, but was still unsure if  
9 he would be involved in a retrial.

10 I assigned Attorney Edward Klein to represent  
11 the defendant at taxpayer expense.

12 After a bail hearing, I also made a  
13 determination regarding that issue. Based upon the  
14 consent of all parties, I set a motion schedule and set  
15 a date for retrial upon the consent of all of the  
16 attorneys on December 7th, 2015.

17 Mr. Langone subsequently advised the Court  
18 that he would not be participating in the retrial.  
19 Moreover, Mr. Klein asked for additional time in which  
20 to file motions and requested an adjournment of the  
21 trial in order to retain the services of an expert  
22 witness who would testify regarding the time of death  
23 of the decedent.

24 It's my recollection that Mr. Klein indicated  
25 that the expert witness in question would not be

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1 available for trial in December. Accordingly, I  
2 granted Mr. Klein's request to reschedule the trial for  
3 a new agreed upon date of March 21st, 2016.

4 As I previously have noted, the Second  
5 Circuit subsequently issued its December 23rd, 2015  
6 order.

7 With all due respect to the Second Circuit, I  
8 was somewhat confused at the language of the order  
9 suggesting that Mr. Langone would be able to try this  
10 case by February 1st, 2016 in light of his previous  
11 statement in this Court that he would not be involved  
12 in the retrial of this case.

13 My chambers subsequently reached out to  
14 Mr. Langone and advised him of today's Court  
15 appearance. Mr. Langone was unable to appear today,  
16 which is most certainly understandable given the fact  
17 that his law office is several hundred miles away.  
18 Nevertheless, Mr. Langone submitted a letter to the  
19 Second Circuit and provided a copy to my chambers.

20 In pertinent part, that letter reads as  
21 follows:

22 "Dear Your Honors. I received the Court's  
23 order to show cause directing me to be ready to  
24 represent Mr. Rivas at a retrial in the event the State  
25 is ready to proceed by February 1st, 2016."

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1 And Mr. Langone then indicates (ECFDKT 204).

2 "I have spoken to Edward Klein, Esquire, who  
3 was appointed by the State to represent Mr. Rivas.  
4 Mr. Klein does not know if the State is actually ready  
5 to retry Mr. Rivas, but Mr. Klein is not ready as he  
6 has not -- as he still has not filed motions and has  
7 another trial scheduled to begin the end of January,  
8 2016.

9 "Mr. Klein told me that Mr. Rivas' case is on  
10 the trial calendar for the end of March, 2016. In my  
11 professional opinion, the Rivas case requires  
12 substantial motion practice given the 30 years that  
13 have elapsed since the crime was committed and the  
14 current impediments to him receiving a fair trial at  
15 this late date.

16 "While I am willing to represent Mr. Rivas at  
17 the retrial, the earliest I can try his case would be  
18 at the end of March, 2016, as my case load is simply  
19 too congested to try it earlier.

20 "I have a reply brief due in this Court on  
21 January 7th at a massive civil rights case, in re  
22 Restivo, R-E-S-T-I-V-O, versus County of Nassau, Docket  
23 46462. I have a murder case in Richmond County Supreme  
24 Court that is tentatively scheduled for trial  
25 February 21st, 2015, People v. Thomas Spagnulo,

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1 S-P-A-G-N-U-L-O, 2015-R1003100. I have appeals in two  
2 criminal cases that are overdue, People v. L.,  
3 Appellate Division Second Department, filed 2014-07882,  
4 and People v. Robert Cassandro, C-A-S-S-A-N-D-R-O,  
5 First Department, New York County, Indictment Number  
6 10362-12.

7 "The last thing I ever want to do is  
8 disappoint the Court. I can promise to have all  
9 pretrial motions filed and the case prepped for trial  
10 by April 1st, 2016, but to force me to try it sooner  
11 would not be in the best interests of justice."

12 And it is signed, "Respectfully yours,  
13 Richard M. Langone."

14 I'm unclear as to whether the Second Circuit  
15 is aware of my effort to get this case retried.  
16 Frankly, I find it hard to believe that they do. I am  
17 willing to readjust my trial calendar and schedule this  
18 matter for trial on February 1st, 2016, but, it is  
19 clear that Mr. Langone would not be able to try this  
20 case on that day.

21 I've spoken with our Commissioner of Jurors  
22 and I can try this case and jurors would be available  
23 as of February 1.

24 Would the People be ready to try this case on  
25 February 1?

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1 MR. MORAN: Absolutely.

2 THE COURT: Mr. Klein, what would your  
3 position be with regard to a February 1st trial date?

4 MR. KLEIN: Your Honor, we appeared in this  
5 Court on November 18th and had lengthy discussions  
6 about where I was at in the case, and, excuse me, where  
7 I was at in the case in terms of preparation and what I  
8 would need to be doing, and I had concerns about the  
9 March trial date and was requesting the Court consider  
10 adjourning it until later, possibly May or June.

11 For various reasons, we left it on that date.  
12 We adjusted the motion date, which I think is  
13 January 21st, that it's on the calendar right now.  
14 Nothing has changed for me since that November 18th  
15 date.

16 There are items I asked this morning, I think  
17 I put on the record the issue having to do with  
18 marijuana pipes, and on the November 18th appearance,  
19 there were marijuana pipes or piping found in the  
20 vicinity of the body 28 years ago that were never  
21 tested. They were never -- it was never looked at by  
22 Mr. Cali. It was never thought of by Mr. Cali.

23 I didn't know about that until September when  
24 I received the same video and I believe 17 photographs  
25 and then I understood the importance of the marijuana

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1 pipe.

2 Also, looking through the police reports, I  
3 had clear that there is evidence that Mr. Rivas did not  
4 smoke marijuana. So, it becomes a significant piece of  
5 evidence that needs to be explored.

6 I asked Mr. Moran, the pipe had been at the  
7 lab, was not tested. I asked for it to be tested for  
8 DNA.

9 Speaking with him this morning, my  
10 understanding is, he did request the lab do that and  
11 they are going to issue a report sometime next week,  
12 apparently.

13 So, things have been going on that need to be  
14 done to be properly prepared for trial. Those things  
15 have been going on and will continue to go on until we  
16 are ready for trial, but it wouldn't be in Mr. Rivas'  
17 best interests from the defense standpoint in January  
18 and there is no way that it can be fairly tried in  
19 January even if the People are theoretically ready and  
20 able to call and proceed with their testimony.

21 So, nothing has changed since November. I  
22 can try for the March date, but I again caution the  
23 Court that I don't know that we are going to be ready.

24 THE COURT: So, the first trial date, you  
25 would not be ready to proceed is, at that point, at --

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1 MR. KLEIN: No, nor would Mr. Langone, even if  
2 he were free.

3 There are things that need to be done that  
4 cannot be done in that time frame. And I understand,  
5 to a certain extent, the Second Circuit's frustration.  
6 They may be able to view, if it was going to take this  
7 long, Mr. Rivas, under the circumstances, that they  
8 found or they found potential for actual innocence  
9 based on the record they had before them, that he  
10 should not still be in custody, but, if it's going to  
11 be retried, and I'm retrying it, it can't be done in  
12 January, consistent with Mr. Rivas' best interests, and  
13 it would be an effort to get it ready by March 21st.

14 THE COURT: Okay. Thank you.

15 MR. KLEIN: And just the reference to the  
16 marijuana pipe is just one example. There are many  
17 others that I could give the Court, but that, in and of  
18 itself, is enough, waiting for that report, not knowing  
19 what the report is going to say and the possibility of  
20 the need to go retain our own DNA expert, and we are  
21 talking -- we are already in the middle of January by  
22 that point. So, it would be an impossible task to try  
23 this case by then.

24 THE COURT: Mr. Moran, did you want to be  
25 heard any further, sir?

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1 MR. MORAN: One of the reasons, Judge, that  
2 it's taken so long to get those DNA reports finished is  
3 that we had to get Mr. Rivas' DNA in order to compare  
4 them to whatever may be generated from the items of  
5 evidence he wants tested.

6 That wasn't accomplished until we asked the  
7 Court for an order, and the Court granted that in  
8 November. I had asked earlier if Mr. Rivas would be  
9 willing to voluntarily give over a sample, and up until  
10 that point, he was saying, "No, we are not going to  
11 voluntarily give over a sample."

12 One of the reasons for any delay in those DNA  
13 reports is Mr. Rivas' unwillingness to voluntarily give  
14 over a sample, which meant we had to wait until we had  
15 something to compare it to, which takes some time.

16 THE COURT: Mr. Rivas, it's a difficult and a  
17 frustrating position for me to be in.

18 First of all, Mr. Klein is an experienced and  
19 an excellent trial attorney. I did not assign him to  
20 this case, which is a critically important case, case  
21 of this magnitude, without careful consideration. But,  
22 under the circumstances, I cannot conclude that it  
23 would be prudent to require Mr. Klein to try this case  
24 on February 1st. It doesn't sound like that's in  
25 anyone's best interests.

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1           Indeed, if I were to do that, I would be  
2           virtually insuring that if there were a conviction and  
3           a retrial, that this case would come back following an  
4           Appellate review.

5           The People have been ready for trial. They  
6           indicated again today that they are available for trial  
7           on that February 1st basis. I have no basis to  
8           conclude that this announcement is an illusionary one  
9           by the People.

10          In light of the fact that neither Mr. Langone  
11          nor Mr. Klein would be ready to try this case by  
12          February 1st, despite the fact that I've contacted our  
13          Commissioner of Jurors and I could have a jury panel  
14          ready for you, I cannot in good conscience force either  
15          of the attorneys to try this case by that date.

16          I previously gave Mr. Klein a trial date of  
17          March 21st. I'll keep this matter scheduled for trial  
18          on that date.

19          We talked about the filing of motions,  
20          Mr. Klein. You indicated, in your review, there were  
21          some unique issues for motion practice. Why don't you  
22          tell me when you can get your motions in and I'll give  
23          you -- I will give you a date regarding filing an  
24          argument.

25          MR. KLEIN: I'd like to leave the 21st date on  
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1 for me to have a date that I'm aiming at, Judge, 21st  
2 of January for filing, and I'd really like to keep that  
3 on. It will be an effort.

4 And as things continue to evolve, as I learn  
5 more about the case, and I won't burden you with  
6 details, but, it's a complex case because of how badly  
7 Mr. Rivas was represented in 1993 from his arrest in  
8 November of '92, to a trial in March of '93, and the  
9 passage of time. It's a complex situation and can't be  
10 done quickly.

11 I'm going to try to have them in by the 21st.

12 THE COURT: I just honestly don't recall. Did  
13 I give you a motion argument date?

14 MR. KLEIN: I think it was the 21st.

15 THE COURT: Is the argument date, Ed?

16 MR. KLEIN: Yes. So, we can leave that on as  
17 a court date for either me to file motions or appear;  
18 that sort of thing. I'd like to keep a target so that  
19 I keep focused on it.

20 THE COURT: So, January 21st, 2016, is for the  
21 argument of motions.

22 Anything further, Mr. Klein, Mr. Manes,  
23 anything?

24 MR. KLEIN: Couple of things.

25 One, I note for the record that Mr. Langone  
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1 has not entered an appearance here. He's not counsel  
2 of record for Mr. Rivas.

3 THE COURT: He told me on the record here  
4 previously that he would not be. That's one of the  
5 reasons I was confused by the Second Circuit's letter  
6 decision.

7 MR. KLEIN: And I'm not sure, first of all,  
8 it's Mr. Rivas' choice to a certain extent and that  
9 decision has been made and I'm not sure that Mr. Rivas  
10 would accept Mr. Langone being forced on him, as  
11 Mr. Langone uses that term, by the Second Circuit.

12 So, it is my case and the decision about  
13 whether we are ready or not is my decision based on my  
14 knowledge of the case, not Mr. Langone.

15 THE COURT: I understand.

16 Sidney?

17 MR. MANES: Judge, may I be heard for just one  
18 second?

19 THE COURT: Please.

20 MR. MANES: I've been involved in this case,  
21 as the Court knows, for 19 years.

22 THE COURT: Yes.

23 MR. MANES: I just want to emphasize to the  
24 Court that this is a 30 year old case, Number 1.  
25 Mr. Rivas has served 24 years in a minimum sentence of  
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1 25 to life.

2 I just wonder if this Court can have the  
3 benefit of reducing bail to a dollar so Mr. Rivas, as  
4 the Court has indicated, while this is all pending, let  
5 Mr. Rivas go home.

6 He's not going to go anywhere, Judge. He has  
7 family in the Bronx. He has lived here all his life.  
8 He has not run. He didn't run when he was indicted.  
9 He didn't run.

10 So, I'm asking the Court, under the  
11 circumstances, with all that's going on between the  
12 District Attorney and Mr. Klein and all that's being  
13 discovered, let Mr. Rivas go home.

14 The Court has indicated very clearly in the  
15 Second Circuit that had Mr. Cali been the minimum  
16 efficient, the jury would not have convicted him and  
17 then they said, on top of that, "actual innocence."

18 Judge -- Judge Miller, I've known Mr. Rivas  
19 all these years. I've known his family, his children,  
20 his wife. He ought to go home to the Bronx and not  
21 continue to sit here in jail under the circumstances of  
22 what the Second Circuit found, without question, and I  
23 would ask the Court to please consider that.

24 THE COURT: Thank you, Mr. Manes. I  
25 appreciate that.

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1 Mr. Moran, would you like to be heard?

2 MR. MORAN: Judge, I've said all I've said  
3 about bail. I think this might be the fifth or sixth  
4 different bail application that Mr. Rivas or various  
5 attorneys have made. I don't have anything to add to  
6 what I've already said before. I think bail is  
7 appropriate to what it is.

8 THE COURT: Despite Mr. Manes' excellent  
9 arguments on your behalf, Mr. Rivas, I am not going to  
10 change the bail.

11 What the Second Circuit may do is up to the  
12 Second Circuit, but I am not going to change your bail  
13 here in this Court.

14 I'll see you back here for the argument of  
15 motions, hopefully, on that January -- January 20 --

16 MR. KLEIN: May we approach?

17 THE COURT: -- January 21 date.

18 MR. MORAN: Judge, in anticipation of that, I  
19 will provide the Court with the Grand Jury minutes, if  
20 I haven't already done that, so you can review those.  
21 I believe that's part of the motions, anyway. It will  
22 expedite matters.

23 THE COURT: Thanks.

24 MR. KLEIN: May we approach?

25 THE COURT: Sure.

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1 (Bench conference.)

2 THE COURT: All right. Mr. Klein, did you  
3 want to be heard any further?

4 MR. KLEIN: Well, in thinking about it  
5 further, Judge, with the DNA report coming in sometime  
6 next week and the Second Circuit response to this not  
7 being scheduled for trial, happily, around the 1st, I  
8 think it makes sense to adjourn the motion argument  
9 date.

10 So, I would request that be adjourned to  
11 February 5th, so we don't lose too much time, but still  
12 have those things accomplished.

13 I also say, as part of that request, and we  
14 discussed this up at the bench, and I thought I made  
15 this clear, but I am the attorney of record for  
16 Mr. Rivas now and Mr. Langone is not. He has not  
17 entered an appearance.

18 As the Court has indicated, he was asked  
19 about that and indicated that he would not be  
20 representing Mr. Rivas. I think that was during  
21 sometime during the summer and that has stayed  
22 unchanged until the order of the Second Circuit,  
23 December 23rd, which suggested that somehow Mr. Langone  
24 would be able -- would be representing -- would be able  
25 to represent Mr. Rivas in the trial of this matter.

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1 As we stand here today, I am Mr. Rivas'  
2 attorney. He wants me to be his trial attorney and not  
3 Mr. Langone.

4 THE COURT: You've heard what your attorney  
5 has said, Mr. Rivas. Is that true, sir?

6 THE DEFENDANT: Very clear, Judge Miller.

7 THE COURT: And that is true?

8 THE DEFENDANT: Yes.

9 THE COURT: Very good.

10 Okay. I'll see you back here on February 5th  
11 for the argument of motions.

12 MR. KLEIN: Thank you, Your Honor.

13 THE COURT: Thank you all.

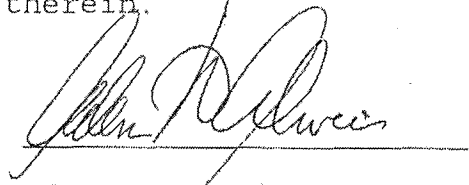
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C E R T I F I C A T E

I, Adam H. Alweis, RPR, Senior Court  
Reporter, Fifth Judicial District, State of New  
York, do hereby certify that the foregoing is a true  
and accurate transcript of my stenographic notes  
from the proceedings had therein.

A handwritten signature in dark ink, appearing to read "Adam H. Alweis", is written over a horizontal line.

Adam H. Alweis, RPR

Senior Court Reporter

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